INDEX

Page

Petition for a Writ of Certiorari 1

Questions Presented 5

History 6

Facts 7

Arguments 8

This Court Has Jurisdiction Because Petitioner Had No Notice of Proceedings 8

Petitioner Was Discriminated Against for Occupational Reasons 9

CASES CITED

Cassell vs. Texas, 339 U. S. 587 10

Dick vs. Railroad Co., 38 O. S. 389 11

Gibbs vs. Girard, 102 N. E. 299 11

Norris vs. Alabama, 294 U. S. 587 10

Pierce vs. Louisiana, 306 U. S. 354 10

Scott vs. McNeal, 154 U. S. 34 8

Wolf vs. Marshall, 165 N. E. 848 11

AUTHORITIES CITED

Ohio Constitution Article I, Sec. 5 9

U. S. Constitution Amendment XIV 2, 5, 6

O. G. C. Sec. 1532 9

O. G. C. Sec. 11378 9

O. G. C. Sec. 11379 9

O. G. C. Sec. 11384 10

O. G. C. Sec. 11631 ..... 1, 3, 6, 11

IN THE

Supreme Court of the United States

No. .....

CAP S. MCELROY,
Petitioner,

vs.

COBOURN, YAGER, NOTNAGEL, SMITH & MORAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH APPELLATE DISTRICT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

The petition of Cap S. McElroy respectfully asks for a writ of certiorari directed to the Sixth Appellate District Court of Appeals, in and for Lucas County, Ohio, the Court in which the record of this cause is now lodged and shows that this action was commenced in the Court of Common Pleas of Lucas County, Ohio, by Cap S. McElroy against Cobourn, Yager, Notnagel, Smith & Moran, to vacate after term, under Ohio General Code Section 11631 a judgment rendered without the knowledge of Petitioner in which he had no opportunity to appear and defend.

On September 7, 1950, Cobourn, Notnagel, Smith & Moran, (Yager joined firm later) filed a petition charging that Petitioner owed the firm a sum of money totaling Two Thousand, Five Hundred and Sixty ($2,560.67) Dollars and Sixty-Seven Cents. Petitioner filed an answer within the limitation of time denying the allegation and setting up a breach of contract as a defense. Respondents with the Court of Common Pleas brought this case up for hearing without notifying Petitioner whereby he had no opportunity to appear and defend, and he never learned of this until it was too late to file an appeal.

Petitioner tried to correct this error through filing a new petition under Ohio General Code Section 11631 to reopen the case after term and vacate the judgment. Petitioner filed his petition in the Court of Common Pleas of Lucas County, Ohio, on June 2, 1952, and petition was dismissed on August 9, 1952. An appeal was taken to the Sixth Appellate District Court of Appeals in and for Lucas County, Ohio, which on January 19, 1953, affirmed without opinion the action of the Court of Common Pleas. Petitioner filed a motion for opinion in the Court of Appeals and the same motion was ordered stricken from the files, and decision was journalized on February 2, 1953. Petitioner filed with the Supreme Court of the State of Ohio an appeal as of right, also a motion for order directing the Court of Appeals to certify its record. The motion to certify was overruled on April 15, 1953, and the Appeal as of Right dismissed on same day.

Petitioner claims that this Honorable Court has jurisdiction of the subject matter in this case because it is repugnant to the Fourteenth Amendment to the Constitution of the United States. Petitioner has been deprived of property without due process of law and denied the equal protection of the laws.

In the original case No. 173628 filed on September 7, 1950, petitioner was not notified of the time and place of taking the judgment, hence had no opportunity to appear and defend, hence, judgment taken without due process of law. He was denied jury trial as guaranteed by the Constitution of Ohio, Article I, Section 5, which he had asked for.

Ohio General Code Section 11631, offered an opportunity to have this error rectified even though Petitioner did not know of this in time to appeal within the limitation of time, yet the Courts of Ohio have denied him his right to rectify any injustice done him.

A certified copy of the transcript of the record of the proceedings in all said Courts in this case including the Supreme Court of the State of Ohio is submitted herewith.

Your Petitioner is advised and believes that the judgment of the Court of Appeals and the refusal of the Supreme Court of the State of Ohio to review in this case are erroneous in manner and form as herein set forth as appears from said transcript of the record and proceedings, and that this Honorable Court ought to require this cause to be certified to it for review, consideration and final determination, as provided by law.

Wherefore your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Court of Appeals for the Sixth Appellate District of Ohio, commanding said Court to certify under the seal thereof and send to this Court on a day certain to be named a full and complete transcript of the record and all proceedings of the said Court of Appeals for the Sixth Appellate District of Ohio, in this cause to the end that said judgment of said Court of Appeals for the Sixth Appellate District of Ohio, may be reviewed, considered and determined as provided by

law, and that this Honorable Court may correct the errors complained of herein by your Petitioner and reverse said decision of the Court of Appeals for the Sixth Appellate District of Ohio, and remand said cause and grant such other and further relief as from the nature of the case your Petitioner may be entitled in pursuance to law.

CAP S. MCELROY,
Petitioner.

IN THE

Supreme Court of the United States

No. .....

CAP S. MCELROY,
Petitioner,

vs.

FRANK M. COBOURN, JOSEPH A. YAGER, LELAND H. NOTNAGEL,
FRED A. SMITH, EDWARD R. MORAN,
doing business as
COBOURN, YAGER, NOTNAGEL, SMITH & MORAN,
Respondents.

SUPPORTING BRIEF OF PETITIONER

QUESTIONS PRESENTED

The Petitioner presents the following questions to this Court for consideration:

1. Is equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States violated when state laws, both constitutional and statutory, guarantee trial by jury, and jury trial was both asked for and denied; especially when the adverse party is an attorney, habitually practicing before judge who granted judgment thus being highly favored by same?

2. Should an attorney be sole arbitrator and jury in suit between an attorney and a layman when the

suit involves the former's trade as a tradesman, and the latter objects?

3. Is taking a judgment without notification to the party, nor giving him a chance to appear and defend, a violation of the due process of law clause in the Fourteenth Amendment to the Constitution of the United States?

HISTORY

This case was commenced by Petitioner in the Court of Common Pleas of Lucas County, Ohio, on June 2, 1952, to vacate after term, a judgment which had been taken without the knowledge of Petitioner or his having a chance to appear or defend.

On September 7, 1950, Cobourn, Notnagel, Smith & Moran, (now Cobourn, Yager, Notnagel, Smith & Moran) filed a Petition against Petitioner, claiming that Petitioner owed the firm legal fees. Petitioner filed an answer within time limitation denying the allegation and asking for jury trial. Petitioner heard no more of this case until on Saturday, November 18, 1950, he learned that a judgment had been taken in his absence and without his knowledge or chance to appear and defend. This judgment was taken on October 31, 1950, and the next business day after November 18, 1950, would be too late to take an appeal.

Under Ohio General Code Section 11631, Petitioner was offered a remedy for this action and on June 2, 1952, filed his petition to correct same. Respondents filed a demurrer to the petition on July 11, 1952, and demurrer was sustained on August 9, 1952. A Notice of Appeal to the Court of Appeals was filed and heard on January 5, 1953. Action of the Court of Common Pleas was affirmed on January 19, 1953, without Opinion. Petitioner filed a

motion for Opinion with the Court of Appeals which was stricken from the files and action of the Court of Appeals journalized on February 2, 1953.

On February 20, 1953 Petitioner filed his notice of appeal to the Supreme Court of the State of Ohio which was an appeal as of right and also a motion for an order directing the Court of Appeals to certify its record. The motion to certify was overruled and the appeal as of right was dismissed, both on April 15, 1953.

Petitioner filed with the Chief Justice of the State of Ohio his Petition for Appeal and Assignment of Errors on June 10, 1953, which was disallowed on June 22, 1953.

FACTS

Petitioner was not present at the hearing of Cause No. 173628 in the Lucas County, Ohio, Court of Common Pleas. (See Journal Entry) Respondents claim that he was notified of the hearing; Petitioner denies it.

Petitioner asked for jury trial in C. P. Cause No. 173628 and jury trial was not had (see Petitioner's answer).

Petitioner had denied the charges in C. P. Cause No. 173628.

In case at bar Petitioner stated as facts that Respondents had practiced fraud, that he was not notified of the time and place of taking the judgment. Respondents did not deny it (see original Petition and Demurrer).

ARGUMENTS

This Court Has Jurisdiction Because Petitioner Had No Notice of Proceedings

Since Petitioner had no notice of the proceedings in Lucas County, Ohio, Common Pleas Cause No. 173628 which was a petition by Respondents to obtain the original judgment, judgment was without due process of law in violation of the Fourteenth amendment to the Constitution of the United States.

In *Scott vs. McNeal*, 154 U. S. 34, this Court ruled:

> "No judgment of a Court is due process of law if rendered without jurisdiction in the Court or without notice to the party." (p. 46)

Since Petitioner did not learn of this in time to appeal within the limitation of time, the laws of Ohio offered another remedy which was Ohio General Code, Section 11631, which reads:

> "The Common Pleas Court or the Court of Appeals may vacate or modify its own judgment or order, after the term at which it was made (ten Items). Item 4. For fraud practiced by the successful party in obtaining a judgment or order. Item 7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending. Item 9. For taking judgments upon warrants of attorneys for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking the judgment."

Petitioner is using this method of correcting an illegal procedure, as appeal within the time limit was impossible due to Petitioner having no notice of the precedure.

Petitioner Was Discriminated Against for Occupational Reasons

The Constitution of Ohio, Article I, Section 5, reads:

> "The right of trial by jury shall be inviolate, except that in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Ohio General Code, Section 11379, provides:

> "Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial be waived or a reference be ordered as hereinafter provided."

Ohio General Code, Section 11378, further provides:

> "An issue of fact arises:
>
> "1. Upon a material allegation in the petition denied by the answer.
>
> "2. Upon a counter-claim or new matter, presented in the answer and denied by the reply."

Petitioner realizes that the Constitution of the United States does not within itself make trial by jury the law of the states, however, if state law provides for trial by jury as is the case in Ohio, then the "Equal Protection of the Laws" clause of the Fourteenth Amendment makes the jury trial apply to all persons in that state alike.

Since Petitioner in C. P. No. 173628 denied the material allegation in Respondents' Petition such as owing the obligation and further set off the counter-claim or new matter in the form of Breach of Contract to appeal, which was never replied to, Petitioner raised an issue of fact which should have been decided by a jury.

Petitioner did not wish to have the facts decided by the Court for reason that under Ohio law, all Common Pleas Judges must be attorneys (see Ohio General Code, Section 1532) and Respondents also were attorneys and

case involved their trade as tradesmen. Such could be compared with a strike in an industrial establishment in which a member of the striking union were made sole arbitrator, or an industrial manager, being made sole arbitrator.

If case involved parties being involved in an automobile wreck, no persons trade as a tradesman would be involved and Petitioner would not have so strong a case to charge occupational discrimination, but C. P. No. 173628 did involve Respondents' trade as tradesman.

Petitioner asks this Court being all attorneys to give the same justice to one outside that profession against an attorney as this Court being all white has given to other races in litigation against whites. In *Pierce vs. Louisiana,* 306 U. S. 354, this Court ruled:

> "* * * trial by jury cease to harmonize with our traditional concept of justice at the moment particular groups, classes or races otherwise qualified to serve as jurors in a community are excluded as such from jury service." (p. 358)

The above case involves the conviction of a negro for murder by an all-white jury. The case at bar involves a civil suit between a law firm and a person outside of the legal profession in which the former obtained a judgment against the latter by a jury of all attorneys, or that is what it amounts to when the Trial Judge usurps the authority conferred by state law upon a jury of twelve citizens.

The discrimination from jury service because of race is condemned by this Court in many other cases, see:

Norris vs. Alabama, 294 U. S. 587;
Cassell vs. Texas, 339 U. S. 282.

Ohio General Code, Section 11384, provides:

> "Cases in which there is an issue of fact or damages to be assessed, shall be tried in the order in

> which they stand on the trial docket, unless by the consent of parties, or by the order of the Court, they are continued or placed at the heel of the docket, or for good cause shown may be especially assigned for trial or hearing out of their regular order * * * "

Although case C. P. No. 173628 was filed more than thirty-three months ago and was heard in less than two months after filed, other cases filed sooner have been brought to trial only three months past. For the Ohio Supreme Court's interpretation of trial by jury in general cases, see:

Dick vs. Railroad Co., 38 O. S. 389;
Gibbs vs. Girard, 102 N. E. 299.

The reason that Case C. P. No. 173628 was not appealed but Petitioner is trying to rectify through this case through Ohio General Code, Section 11631 is that Petitioner did not know of that judgment until it was too late to appeal. In *Wolf vs. Marshall*, 165 N. E. 848, the Ohio Supreme Court ruled:

> "A majority of this Court are of the opinion that the legislature did not intend to require the performance of an impossible act."

CONCLUSION

Wherefore, Petitioner prays that this case be reviewed, reversed and remanded to the Court of Common Pleas of Lucas County, Ohio, for proceedings not inconsistent with the findings of this Court.

CAP S. MCELROY,
Petitioner.